Supreme Court, U.S.
FILED
AUG 31 2004
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No. 03-1512

In The Supreme Court of the United States

RONALD JOHNSON AND DEE JOHNSON,

Petitioners,

v.

CITY OF SHOREWOOD, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

SUPPLEMENTAL BRIEF

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August 31, 2004

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SUPPLEMENTAL BRIEF

Pursuant to Rule 15 of the Rules of the Supreme Court of the United States, Petitioners file this supplemental brief to update this Court on filings of court orders in three different proceedings, but related to Johnsons' claims in the pending Petition for Writ of Certiorari.

I. On May 21, 2004, the Minnesota District Court Recognized in a Related Proceeding That Shorewood Has Paid ZERO Compensation To Johnsons for the Previously-Adjudicated Taking.

The Johnsons pro se have been involved with multiple litigation appealing Shorewood's illegal sump pump assessments since 2001.[1] The Johnsons have claimed in the pending litigation before the U.S. Supreme Court that Shorewood is using the sump pump assessments as retaliation for Johnsons filing federal court actions to obtain just compensation for the previously-adjudicated taking.

On May 21, 2004, Hennepin County District Court then-Chief Judge Kevin S. Burke confirmed in the sump pump assessment litigation that the Johnsons have received NO compensation for the previously-adjudicated

[1] Enacting City Code § 904.09 – shortly after Judge Montgomery ruled that Shorewood's disposals of storm sewage on Johnsons' property constituted an uncompensated taking – the City had all homeowners dispose of their sump pump water to City streets/storm sewer system additionally disposed of on Johnsons' property. Notwithstanding, shortly after the Johnsons filed the claims herein in federal district court the City imposed a $100 per month (accrued since 1996) presumed sump pump water disposal fee by tax special assessment on Johnsons' property as an alleged "improvement" net benefit to Johnsons' property which the Johnsons objected to and repeatedly appealed.

taking in the previous state court condemnation proceedings:

> ***Facts***
>
> This case and the relationship of the parties have a rather litigious history. In 1991, Ronald R. Johnson, the petitioner, was awarded damages against the City of Shorewood to compensate him for a taking by the City when they constructed a drainage facility. ***The City did not pay the petitioner's damages***. Although, the petitioner and the City ultimately enacted a settlement agreement, the city of Shorewood breached this agreement by not paying the petitioner.

Johnson v. City of Shorewood, et. al., No. AP 03-20830 (Minn. Dist. Ct. May 21, 2004 Order), App. 1-8 (emphasis added).

So, there can be no doubt that the consequence of the "state court vacat[ing] the $2,000 takings award" – as the U.S. Court of Appeals for the Eighth Circuit put it – was the City paid NOTHING for the previously-adjudicated taking. *Johnson v. City of Shorewood,* 360 F.3d 810, 815 (8th Cir. 2004). Johnsons assert that such a result is a violation of their rights under the Just Compensation Clause of the Fifth Amendment to the Constitution of the United States and actionable in federal court pursuant to 42 U.S.C. § 1983. *See Williamson County Reg'l Planning Comm. v. Hamilton Bank*, 473 U.S. 172 (1985) ("[I]f a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.").

II. On June 4, 2004, The Minnesota State Courts Entered Final Judgment Refusing to Provide the Johnsons With A Judicial Forum That the U.S. Court of Appeals for The Eighth Circuit Suggested Was Guaranteed.

The Johnsons pro se pursued in earlier sump pump assessments litigation a non-section 1983 forum for their fraud-on-the-court remedy – expressly reserving all claims in federal court and moving for stays on the litigation. *Johnson v. City of Shorewood, et. al.*, 2004 Westlaw 193212 (Minn. App. February 3, 2004), *review denied* (Minn. April 28, 2004). The Johnsons lost on all claims. On June 4, 2004, the Minnesota Courts concluded the earlier sump pump assessments litigation with a final judgment. App. 9-10.

The entry of the final judgment is important because it contradicts the U.S. Court of Appeals for Eighth Circuit's suggestion that Johnsons' request for a state forum for a fraud-on-the-court post-post-deprivation Just Compensation Clause remedy is guaranteed:

> The Johnsons argue that they were denied just compensation due to "misrepresentations" perpetrated in the state court proceedings – misrepresentations that they allegedly discovered after the fact. Whatever the validity of these allegations, *Rooker-Feldman* stands as a bar to federal review because the Johnsons' requested relief "would effectively reverse the state court decision or void its ruling." *Bechtold v. City of Rosemount*, 104 F.3d 1062, 1065 (8th Cir. 1997). ***The Johnsons' remedy, if any, is to return to state court and utilize the procedures for remedying fraud***. *See Johnson v. Smithsonian Institution*, 189 F.3d 180, 186-87 (2nd Cir. 1999).

860 F.3d at 819 (emphasis added).

Here is what the Minnesota Court of Appeals stated regarding a state forum for Johnsons' non-section 1983 fraud-on-the-court claims:

> ***Next, Johnson contends there is evidence that the city deprived him of constitutional protections and claims other constitutional flaws. The district court ruled that he did not plead a section 1983 claim, and that he has not shown other constitutional flaws as a matter of law. This decision is not erroneous.***
>
> Johnson also challenges the district court's grant of summary judgment on his claims of fraud on the court under Minn. Stat. § 548.14 (2002). "[F]raud on the court must be an intentional course of material misrepresentation or non-disclosure, having the result of misleading the court and opposing counsel," making the result "grossly unfair." *Maranda v. Maranda*, 449 N.W.2d 158, 165 (Minn. 1989). ***Johnson has not shown that the district court erred in granting summary judgment on his fraud-on-the-court claim.***

2004 Westlaw 193212 at 3 (emphasis added).

So, the U.S. Court of Appeals for the Eighth Circuit was wrong. In fact, the Minnesota courts do not provide fraud-on-the-court "procedures" specific enough to guarantee a Just Compensation Clause post-post-deprivation remedy for those who have received ZERO post-deprivation Just Compensation Clause remedy after a previously-adjudicated taking.

The only route available for the Johnsons to secure their rights under the Just Compensation Clause is an action under 42 U.S.C. § 1983. That is why this Court should grant the Petition.

III. On July 15, 2004, the U.S. Court of Appeals for the Federal Circuit Stayed Johnsons' Appeal from the U.S. Court of Federal Claims' Judgment Because Johnsons' Petition for Writ of Certiorari is Pending.

After filing their Petition for Writ of Certiorari, the Johnsons filed a motion to the U.S. Court of Appeals for the Federal Circuit, to stay the appeal – regarding the U.S. Corps of Engineers' fraudulent involvement in the 1996 state condemnation proceeding – pending this Court's decision on the Petition for Writ of Certiorari. *Johnson v. United States,* Case No. 04-5093 (Fed. Cir. July 15, 2004 Order), App. 11-12. The U.S. Court of Appeals for the Federal Circuit granted the Johnsons' motion for stay. *Id.* The Johnsons request that the United States Supreme Court recognize their U.S. District Court remedies, so that the U.S. Court of Federal Claims litigation will likely no longer be necessary.

CONCLUSION

For these additional reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Ronald Richard Johnson,
Petitioner,

v.

City of Shorewood and its mayor, Woody Love, Council members, Scott Zerby, Laura Turgeon, Christine Lizee, and John Garfunkel

and

Hennepin County, Minnesota,
Respondents.

ORDER

(Filed May 21, 2004)

Court File No.
AP 03-~~9919~~-20830

The above-entitled matter came before the Chief Judge, Kevin S. Burke, appearing for the Honorable Ann L. Alton, on April 13, 2004, at the Hennepin County Government Center in Minneapolis, Minnesota, on Petitioner's Motion for Statutory Procedural Relief.

Appearances were made as follows:

Ronald Johnson, *pro se*, appeared personally.

Kimberly B. Kozar, Esq. appeared on behalf of Respondent, City of Shorewood and its mayor, Woody Love, Council members, Scott Zerby, Laura Turgeon, Christine Lizee, and John Garfunkel.

Lisa Hahn-Cordes, Esq. appeared on behalf of Robert T. Rudy, Attorney for Respondent, Hennepin County, Minnesota.

Based upon all the files, records and proceedings herein, together with argument of counsel, the court makes the following:

ORDER

1. Defendants' City of Shorewood and Hennepin County, Motion to Stay the proceeding is hereby **DENIED**.

2. Petitioner's Motion for Statutory Procedural Relief is hereby **GRANTED**.

3. The attached memorandum is hereby incorporated.

BY THE COURT:

/s/ Kevin S. Burke
Kevin S. Burke
Chief Judge,
Fourth Judicial District

Date: May 21, 2004

MEMORANDUM

Procedural History

The issue before this court is whether the City of Shorewood's ("the City") sump pump surcharge, pursuant to Minnesota Statutes § 444.075[1] and City of Shorewood

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[1] Minn. Stat. § 444.075, subd. 3, states in relevant part:

> To pay for the construction, reconstruction, repair, enlargement, improvement, or other obtainment and the maintenance, operation and use of the facilities, the governing body of a municipality or county may impose just and equitable charges for the use and for the availability of the facilities and for connections with them and make contracts for the charges as provided in this section. . . . The governing body may make the charges a charge against owner, lessee, occupant or all of them and may provide and covenant for certifying unpaid charges to the county auditor with taxes against the property served for collection as other taxes are collected. The governing body may fix and levy taxes for the payment of reasonable

(Continued on following page)

City Ordinances § 904.09[2] is a special assessment within the meaning of Minnesota Statutes § 429. A hearing was conducted by the undersigned on April 13, 2004. In short, the petitioner appealed the City Council's decision to certify Petitioner's delinquent surcharges as a special assessment. Petitioner has requested that the City turn over the hearing record. The City has not turned over the

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charges to the municipality or county itself for the use and availability of the facilities for fire protection, for maintaining sanitary conditions, and for proper storm water drainage in and for public buildings, parks, streets, and other public places . . .

[2] City of Shorewood Ordinance § 904.09, states in relevant part:

Subd. 1. Prohibited Connections: No person shall discharge or cause to be discharged, directly or indirectly, any storm water, surface water, ground water, roof runoff; subsurface drainage, or cooling water to any sanitary sewer. Any person having a roof drain, sump pump, unauthorized swimming pool discharge, cistern overflow pipe or surface drain connected and/or discharging into the sanitary sewer shall disconnect and remove any piping or system conveying such water to the sanitary sewer system.

Subd. 2. Authority to Inspect: Every person owning improved real estate that discharges into the City's sanitary sewer system shall allow inspection by authorized City employees or its agents, as deemed appropriate or authorized by the City Council, of all properties or structures connected to the sanitary sewer system to confirm there is no sump pump or other prohibited discharge into the sanitary sewer system. The authority to conduct further inspections on a property under this section shall lapse upon a determination that the property is in compliance with the requirements of this section.

Subd. 5. Surcharge: A surcharge set by an ordinance passed by the City Council is hereby imposed and shall be added to every utility billing to properties not in compliance with this Chapter. The surcharge shall be added to every quarterly utility billing until the property is in compliance.

complete hearing record. The petitioner now brings this present motion to compel the disclosure of the complete record from the hearing pursuant to Minnesota Statute § 429.081 (2004). The City and Hennepin County moved to stay the proceeding pending the outcome of the Minnesota Supreme Court review. The City argues that the charges are not special assessments and therefore Petitioner is not entitled to a record. Alternatively, the City argues that there is no "record" to produce. Hennepin County argues that sump pump charges are special assessments and therefore Petitioner is entitled to a record.

Facts

This case and the relationship of the parties have a rather litigious history. In 1991, Ronald R. Johnson, the petitioner, was awarded damages against the City of Shorewood to compensate him for a taking by the City when they constructed a drainage facility. The City did not pay the petitioner's damages. Although, the petitioner and the City ultimately enacted a settlement agreement, the city of Shorewood breached this agreement by not paying the petitioner.

In 1999, the petitioner brought an action against the City of Shorewood. Judge Peter Lindberg, ruled in favor of the petitioner on the breach of contract claims, but dismissed the taking claims without prejudice. In May 2000, the petitioner filed an action in the U.S. District Court against the City, the U.S. government and other defendants on the taking claims. These claims were dismissed. The petitioner then filed claims in the Court of Federal Claims and subsequently filed several appeals with the U.S. Eighth Circuit Court of Appeals. The Court of Federal

Claims ordered the petitioner to propose a supplement to his complaint and the appeals were affirmed.

The petitioner filed an action, similar to the present motion, in Hennepin County District Court against the City and Hennepin County with respect to certification of sump pump charges. The petitioner asserted that the City Ordinance authorizing the charges was unenforceable and alternatively that he was in compliance with the City Ordinance. Summary Judgment was entered in favor of the City and Hennepin County. The petitioner appealed to the Minnesota Court of Appeals. The Court of Appeals affirmed the District Court's entry of summary judgment. On March 19, 2004, the petitioner filed a petition for review to the Minnesota Supreme Court.

On August 23, 1993, the City of Shorewood adopted Ordinance No. 277, codified as City Code of Ordinances § 904.09. It addressed the city wide problem of individual property owners pumping their sump pump discharges into the municipal sanitary sewer system. City Ordinance § 904.09 prohibits discharge of sump pumps into the sanitary sewer system, and gives authority to the City for inspection of all properties connected to the sanitary sewer system in order to ascertain compliance. Persons who do not comply with the inspection requirement are charged a $100 per month surcharge.

The City maintains its sanitary sewers by requiring an inspection of properties in order to ascertain whether all properties are in compliance with its ordinance § 904.09. Within its maintenance procedure, the City charges a surcharge, pursuant to § 444.075, to property owners that are not in compliance with the City's code.

The petitioner, owns property at 5355 Shady Hills Circle, Shorewood, Hennepin County, Minnesota. He refused to allow the City to inspect his property for compliance with § 904.09. As a result, the City charged him a monthly surcharge of $100 pursuant to § 904.09. The petitioner refused to pay the City's monthly surcharges and in turn the City sent the Petitioner a notice of delinquency on August 29, 2003.

On October 20, 2003, the petitioner received a notice of a hearing to be held on November 10, 2003, before the City Council whereby the City would decide whether to certify the petitioner's delinquent monthly surcharges as special tax assessments. At the hearing, the City passed a resolution certifying the petitioner's delinquent monthly surcharges to the Hennepin County Special Assessment Division for collection. Hennepin County added the petitioner's delinquent monthly surcharges as well as administrative charges as a special assessment to the petitioner's property tax payable in 2004.

On December 9, 2003, the petitioner appealed the City Council's November 10, 2003, decision to certify the petitioner's delinquent surcharges as a special assessment. The petitioner has requested that the City turn over the November 10, 2003 hearing record. The City has not turned over the complete hearing record. The petitioner brings the current motion to compel the disclosure of the complete record from the November 10, 2003, hearing pursuant to Minnesota Statute § 429.081 (2004).

The City argues that the delinquent surcharges are utility charges and not "special assessments" under Minnesota Statutes § 429 because the surcharges are not for public improvement. As such, the City argues that it

does not have to provide the petitioner with a "record" pursuant to § 429.081. However, Hennepin County argues that Minn. Stat. § 444.075, subd. 3, and the City Ordinance § 904.09 give the City the authority to bill and charge the petitioner the sump pump surcharges. Once the charge is certified and included in the home owner's property tax, then the charge is treated and collected as a special or local assessment under Minnesota Statute § 429.

Discussion

"A special assessment is a tax, intended to offset the cost of local improvements such as sewer, water and streets, which is selectively imposed upon the beneficiaries." *Dosedel v. City of Ham Lake*, 414 N.W.2d 751, 755 (Minn. Ct. App. 1987). The fee must pass the local council board (certification) before the fee can be taxed to the property owner. *See* Minn. Stat § 276.03 (2004). Once the fee is certified, the municipality turns over the fee to the county auditor for collection along with the parcel owner's property taxes. *See id.*

Special or local assessments are based on the cost of an "improvement" to a property. Minnesota Statute § 429.011, subd. 5 (2004) states in part, "'Improvement' means any type of improvement made under authority granted by section 429.021 . . . " Minnesota Statute § 429.021, subd. 1(2) (2004) states:

> The council of a municipality shall have the power to make the following improvements: . . . (2) To acquire, develop, construct, reconstruct, extend, and maintain storm and sanitary sewers and systems, including outlets, holding areas and ponds, treatment plants, pumps, lift stations, service connections, and other appurtenances of

> a sewer system, within and without the corporate limits.

Minnesota law very broadly defines "Improvement." Under these sections, "improvement" includes "maintaining" sanitary sewers and systems. The sump pump surcharge is part of maintaining the City's sanitary sewer system and is considered an "improvement" under Minnesota Statutes §§ 429.11, subd. 5 and 429.021, subd. (2). Therefore, the City's surcharge, that was certified and given to the county auditor for collection, is a special or local assessment under Minnesota Statute § 429.

The Minnesota legislature has created a procedure to challenge special or local assessment, under Minnesota Statues § 429.081. It states in relevant part:

> Within 30 days after the adoption of the assessment, any person aggrieved, who is not precluded by failure to object prior to or at the assessment hearing . . . may appeal to the district court by serving notice upon the mayor or clerk of the municipality . . . The municipal clerk shall furnish appellant a certified copy of objections filed in the assessment proceedings, the assessment roll or part complained of, and all papers necessary to present the appeal . . .

Therefore, an aggrieved person is entitled to a record of the decision to certify the assessment, including objections and other papers necessary for the appeal. In the present case, the petitioner is entitled to a copy of the record of the City's decision to certify the delinquent surcharges as assessments.

K.S.B.

STATE OF MINNESOTA

Ronald Richard Johnson, Appellant, vs. City of Shorewood, et al., Respondents, Hennepin County, Minnesota, Respondent

JUDGMENT

Court of Appeals

Appellate Court # A03-621

Trial Court # MC 02-721

Pursuant to a decision of Court of Appeals duly made and entered, it is determined and adjudged that the decision of the Hennepin County District Court, Civil Division herein appealed from be and the same hereby is affirmed and judgment is entered accordingly. A certified copy of the entry of judgment and the court's decision is herewith transmitted and made part of the remittitur.

Dated and signed: June 4, 2004

FOR THE COURT

Attest: Frederick K. Grittner
Clerk of the Appellate Courts

By: /s/ Rob Soderstrom
Assistant Clerk

STATE OF MINNESOTA **COURT OF APPEALS**

TRANSCRIPT OF JUDGMENT

I, Frederick K. Grittner, Clerk of the Appellate Courts, do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the cause therein entitled, as appears from the original record in my office, that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my signature at the Minnesota Judicial Center,

In the City of St. Paul June 4, 2004
Dated

Frederick K. Grittner
Clerk of the Appellate Courts

By: /s/ Rob Soderstrom
Assistant Clerk

CORRECTED: July 23, 2004

NOTE: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public order.

United States Court of Appeals for the Federal Circuit

04-5093

RONALD RICHARD JOHNSON and
DEE LUNDBERG JOHNSON,

Plaintiffs-Appellants,

v

UNITED STATES,

Defendant-Appellee

ON MOTION

ORDER

(Filed July 15, 2004)

Ronald Richard Johnson et al. move to stay proceedings in this appeal pending a decision by the United States Supreme Court whether to grant Johnson's petition for a writ of certiorari in *Johnson v. City of Shorewood*, 360 F.3d 810 (8th Cir. 2004). The United States has not responded.

Johnson states that "positive resolution" by the Supreme Court in the "related" Eighth Circuit matter "may obviate the need for this Court to address other questions raised in this appeal."

Upon consideration thereof,

IT IS ORDERED THAT:

(1) The motion is granted. Johnson is directed to file a status report every 90 days or within 14 days of the Supreme Court's issuance of a decision on the petition for a writ of certiorari. The United States may also respond within that time.

(2) This order corrects the court's order issued on July 15, 2004.

FOR THE COURT

JUL 15 2004
Date

/s/ Jan Horbaly
Jan Horbaly
Clerk

cc: Erick G. Kaardal, Esq.
David M. Cohen, Esq.*

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* Counsel for the United States is directed to promptly file an entry of appearance if counsel has not already done so.